

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 75-4220

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U.S. COURT OF APPEALS  
SECOND CIRCUIT

In The  
**United States Court of Appeals**  
For The Second Circuit

PITTSTON STEVEDORING CORPORATION and HOME  
INSURANCE COMPANY,

*Petitioners,*

- against -

FRANK SPATARO,

*Appellee,*

and

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF  
LABOR,

*Respondent.*

*On Appeal From an Order of the Benefits Review Board  
U. S. D. L.*

## BRIEF FOR APPELLEE

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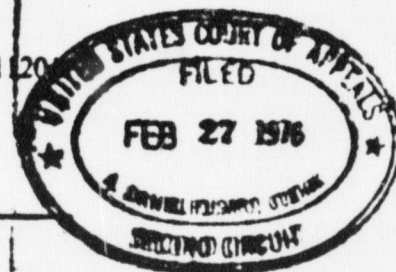
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UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

-----x  
PITTSTON STEVEDORING CORPORATION  
and HOME INSURANCE COMPANY, :  
Petitioners, : BRIEF  
-against- : Case No. 75-LHCA-36  
FRANK SPATARO, : BRB No. 75-130  
Respondent, :  
and, :  
DIRECTOR, OFFICE OF WORKMEN'S :  
COMPENSATION PROGRAMS :  
UNITED STATES DEPARTMENT OF LABOR, :  
Respondent. :  
-----x

ISSUES PRESENTED

1. That the Benefits Review Board correctly construed the Longshoremen's and Harbor Workers' Compensation Act Amendments to include the respondent, Frank Spataro, a longshoreman, who was unloading a container on the stringpiece, that originally had been taken off a ship.

STATEMENT OF CASE

This is an appeal from a decision of the Benefits Review Board in favor of the claimant, Frank Spataro, in an action for compensation brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act. The case rests on the question of jurisdictional coverage.

The case came before the Benefits Review Board on appeal from a decision and order of the Administrative Law Judge, Edward S. Bernstein, who found that the claimant was in maritime employment and the injury occurred in an area covered by the Act. The Benefits Review Board rendered its decision in favor of the claimant affirming Judge Bernstein's decision that claimant was an employee within meaning of the Act and that the accident did not occur in an area covered by the Act.

#### STATEMENT OF FACTS

Respondent, Frank Spataro, was injured on June 28, 1973, while working for Pittston Stevedoring Corporation in the capacity of a hi-lo driver. On the date in question, Spataro was entering a container at the Marra Brothers Terminal in Brooklyn. The container had come from a ship and the accident occurred approximately 25 feet from the water.

#### ARGUMENT

The standard for judicial review in cases arising under the Longshoremen's and Harbor Workers' Compensation Act, has long been established. The Supreme Court has mandated that the findings of a Deputy Commissioner or a Trier of Fact are to be accepted by the Reviewing Court unless "They are unsupported by substantial evidence on the record considered as a whole." O'Leary v. Brown Pacific Maxon, Inc., 340 U. S. 504, 508 (1951) and Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469, (1947).

Therefore, the findings of the Trier of Fact will stand



so long as there is substantial evidence to support them.

Judge Bernstein, The Trier of Fact, found that respondent, Spataro, was entering a container that had come from a ship at the time of the injury. The container in question was adjacent to navigable waters. It was plaintiff's duty to unload these containers and then the cargo would be transported elsewhere. With the advent of containerization, the simple description of a longshoreman has changed considerably. Instead of loading or unloading cargo piece meal, cargo now is loaded or unloaded using large containers. It was Spataro's duties to unload these containers at pierside so they could then be transported to their destination.

In order to come under the Act, Spataro must have been in maritime employment. The Act significantly does not say longshoring operations but classifies employees covered under the Act as those engaged in maritime employment.

It has been held that maritime employment includes, certain work performed ashore, in Hagens v. Ellerman and Bucknall SS Co., 318 F. 2nd, 563, and Thompson v. Calmar SS Corp., 331 F. 2nd 657. In Hagens, the longshoreman was found to be in maritime employment where he was working in a warehouse on cargo unloaded from a vessel. In Thompson, the plaintiff was found to be in maritime employment where he was working in a freight car.

In the case at bar, where Spataro was unloading containers that had come off a ship, his work must be considered maritime employment. Spataro was actually a participant in the loading and

unloading process and his work activities contributed to the movement of cargo onto and off of vessels.

It was for above reasons that the Administrative Law Judge found that Spataro was an employee under the Amended Act which was affirmed by the Benefits Review Board.

It also should be noted that Spataro was a member of the International Longshoreman Association which would be further evidence of his standing as a longshoreman and a participant in the maritime process. This fact clearly has some weight as indicated in the recent decision of Weyerhaeuser Co. v. Robert L. Gilmore and Director, case # 74-3334, a recent decision involving jurisdiction in the 9th Circuit. It has long been the history of the Court's interpretation of the Longshoremen's and Harbor Workers' Compensation Act to construe the statute in favor of the employee. See Luckenbach SS Co. v. Norton, 106 F. 2nd 137 (3rd Circuit, 1939).

In determining what the Act meant by "employee", the definition that the U. S. Dept. of Labor, Benefits Review Board has given, must have great weight. See N.L.R.B. v. Boeing, 412 US 67. (1973) The Board in this decision and other prior decisions has consistently held that employees such as Spataro and even those more remote from the work performed by Spataro are covered under the Act because they are considered employees under the Act as amended. The Board has consistently held that the loading and unloading process continues involving many employees



at various places as long as it is in maritime commerce. They have consistently rejected the claim that the employee must actually be engaged in the loading or unloading of the vessel.

Paragraph 920 of the Longshoremen's and Harbor Workers' Compensation Act also states the following:

"In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter."

The statutory presumption was not overcome by any of the defendant's evidence as found by the Administrative Law Judge in his finding that Spataro was an employee under the Act.

The accident occurred in a terminal area. Under the Amended Act, the accident or injury must occur in, "any adjoining pier, wharf, dry-dock terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." 33 USC 903(a) There is no requirement in the Act that the injury occurred on property owned by the employer. The Board has consistently held in this decision and all prior decisions that the area must be directly related to the employer's longshoring operations. It has also been the Board's policy to eliminate the circumstances of employees walking in and out of the Act's coverage. The facts of this case are clear that the accident occurred in an area adjacent to water. Respondent, Spataro, was performing maritime duties in unloading the cargo at the pierside.

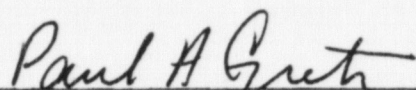
In the recently decided case, I.T.O. Corporation v. BRB. William T. Adkins, No. 75-1051 4th Circuit, the Court held that the area in which a hustler was working, was in an area covered by the Act. The panel of that Court unanimously held that the area in which a longshoreman was injured while transporting cargo as a hustler was covered by the Act.

Again, the Board's determination as to what area was covered under the Act, must be given considerable weight by the Appellate Court in construing the statute in question.

#### CONCLUSION

The Benefits Review Board correctly construed the Amended Act in finding that Johns was an employee under the Act and was injured in an area covered under the Act.

Respectfully Sumbitted,



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Suite 301

BY: MARTIN L. KATZ, ESQ  
TRIAL COUNSEL



UNITED STATES COURT OF APPEALS  
FOR THE ~~THIRD~~ CIRCUIT

Second

Index No.

Pittaton

- against -

Frank Spataro

appelles  
~~Standard Cord~~Director of Office Workers.  
Respectful

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

I, Velma N. Howe

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

298 Mace Street, Brooklyn, New York 11216

That on the 27th day of February 1976, deponent served the annexed

Brief

upon ~~SECRET~~  
SOLICITOR OF LABOR

attorney(s) for

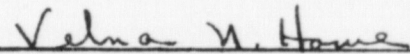
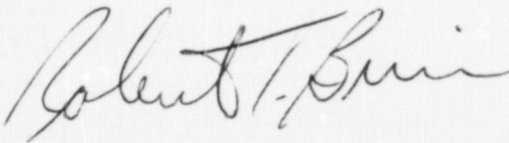
in this action, at 200 Constitution Avenue, N.W. Suite N 2716 NDL

Washington, D.C. 20210

the address designated by said attorney(s) for that purpose by depositing <sup>3</sup> true copy<sup>s</sup> of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 27th

day of February 19 76



VELMA N. HOWE

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31 0418950  
Qualified in New York County  
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

PITTSTON,

Index No.

Affidavit of Personal Service

~~STANDARD RECORD~~ - against - Frank Spataro,  
Appellee  
Director, Office of Workmen's  
Compensation

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
1027 Avenue St. John, Bronx, New York

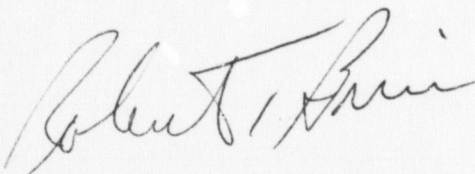
That on the 27th day of February 1976 at 11 Park Place, New York, New York

deponent served the annexed Brief  
Joseph Manes Esq.

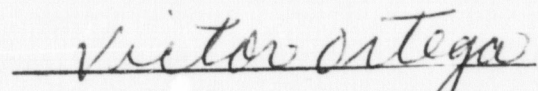
upon

the Attorney in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this 27th  
day of February 19 76



ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977.

  
VICTOR ORTEGA



UNITED STATES DEPARTMENT OF AGRICULTURE

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